Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6452

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ALLEN CLAYBURN JUSTUS,

Petitioner,

- v -

THE STATE OF OKLAHOMA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

## CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 542 P.2d 598 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1a - 22a , infra.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on November 25, 1975. On February 17, 1976, Mr. Justice White extended the time within which a petition for certiorari might be filed until March 24, 1976.

## QUESTIONS PRESENTED

1. Does the post facto invalidation of a statutory provision empowering an appellate court to conduct an evidentiary hearing and thereafter to reduce the death penalty imposed for the crime of first degree murder violate Article I, Section 10 of the Constitution or the Fourteenth Amendment, where the effect of such an invalidation is to subject a criminal defendant to an irreducible death sentence that was not authorized by law at the time of his offense?

2. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

3. Did the exclusion for cause of veniremen on the ground of expressed attitudes toward the death penalty violate petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the Ex Post Facto Clause of Article I, Section 10 of the Constitution of the United States.

2. This case also involves the following provisions of Oklahoma law:

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing or the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the piracing of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. §701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the

first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. §701.6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the pentitiary at hard labor."

## STATEMENT

Petitioner was convicted after a jury trial in the District Court of Oklahoma County of murder in the course of an armed robbery. Five potential jurors who expressed doubt regarding their ability to impose a death penalty were excused for cause. (T.17-18, 20-22, 24-25, 26-27, 76.)

The state's principal evidence was a videotaped statement in question and answer form in which petitioner said:

> "I am not sure of the date. But, this certain night, I called up the Yellow Cab Company.
>
> I requested a cab to come to the South Point Apartments.
>
> I then ran down to the South Point Apartments and waited at Apartment 3, downstairs.
>
> Uh, the cab pulled up. I got in the car. We left and I directed him to 74th Street. That is an apartment complex out there.
>
> Traffic was too busy so I couldn't do what I wanted to do at that time, so I directed him over to Western. I am not sure of the street, but right off Western.
>
> I had him stop. When he stopped, I cocked my pistol and shot him.
>
> Then I moved him over and drove to the South Point Apartments, took his money, wiped the car down and walked home."

(T.279-80.) He also said that he had used a chrome plated thirty-eight caliber Colt with "regular" bullets (T.280-81); that no other person was present in the cab (T.281); that he had sat directly behind the driver and that he had taken approximately thirty dollars (id.) and some change (T.290). He recounted burning the driver's wallet and papers in an ash tray in his living room in the presence of his wife (T.285) and denied having taken anything else (T.281-82). His responses to subsequent questions indicated that after the shooting he drove the cab to a parking lot of the South Point Apartments (T.283) and that he and Bobby Joe Williams later disposed of the gun (T.288-89).

Robert Holmes, the cab driver, had died of a gunshot wound to the head. (T.211) His body was found by the manager of South Point Apartments on the morning of October 9, 1973 (T.243) in Yellow Cab number 50 (T.245 ) Carol Lavon Edwards, who had been a passenger in that cab at about three o'clock on the morning of October 9, testified that she heard it dispatched to the South Point Apartments. (T.225-26)

Officer Marvin Doherty had investigated the crime scene and found a bullet (T.230) which a firearms examiner identified as .38 caliber (T.231) Doherty had found a number of fingerprints inside and outside the cab; none matched petitioners'. (T.231-32)

Bobby Joe Williams testified for the defense that he, his girl friend, Justus and Justus' wife had all been arrested on the same day (T.297-98) and that about thirty minutes after petitioner's arrest "[police officer] Adam Knight, they was taking Allen Justus around . . . and Adam Knight looked at another Detective and said there's a guy I would like to see get his head blown off. He said I wouldn't mind doing it." (Id.) He also heard Knight tell petitioner that if he didn't make a statement to clear up the murder of the cab driver he would never get out of jail. He reported being surprised when he was shown petitioner's videotaped statement because he had never known petitioner"to do anything like that." (T.298.) He testified that he had never seen petitioner with a gun and that petitioner had never told him that he had killed the cab driver. (T.299.) His testimony was impeached by a statement which he had given to the police in which he said that petitioner had described the crime to him in detail and that petitioner had disposed of the murder weapon. (T.301-06.) The witness admitted that he had been convicted of felonies (T.296) including first degree murder (T.300).

Petitioner's father testified that just before midnight on the Thursday of petitioner's arrest,he had been asked to come

to the jail to talk with his son. (T.317.) He said that his son's "eyes were glassy, and he would keep rolling them as if he couldn't focus his eyes on me." (T.318.) Petitioner told his father that he had no knowledge of the crimes about which he was being questioned and asked that he get him a lawyer. (T.318.) The witness attempted to find counsel for his son, but could not find a lawyer who could see him before the following Monday. (Id.)

Petitioner, testifying in his own behalf, admitted that he had been convicted "with Bobby" of first degree murder. (T.321.) He testified that prior to his arrest he had purchased a quantity of L.S.D. (T.321.) As he pulled up to his apartment he spotted detectives and suspected that "it might be a set-up," so he swallowed all of the L.S.D. (T.321-22.) He said that at the police station his requests for counsel were denied (T.321-22) and described his interrogation by Officer Knight before the filming of his statement:

> "I was in a little interrogation room on the fourth floor with Adam Knight. He was questioning me about it, and other things, and I kept telling him, I don't know anything, and I want a Lawyer where I could get out of Jail, and he wouldn't let me have a Lawyer or call one.
>
> And he kept asking me if I was high. I denied it, but he told me, says I have seen enough people high that I know one when I see one. I said well, whatever you think.
>
> He says, am I going to get a statement out of you or not. I said no, sir, you are not. I said, I don't have anything to tell you.
>
> He had a revolver in his belt. He pulled it out and laid it upon the table and cocked it. Well, I had been halucinating a lot right before then, and I thought to myself this may be another halucination, and I laughed at him.
>
> He told me, this is no laughing matter. He says, I am serious. He says if you don't say what I want you to say you will never make it out of this Jail alive. I will shoot you for escape.
>
> He also told me that my wife would be charged with murder, and there would be no bond put on her, and that they had put my son in some kind of children's shelter or something; that I would never see him again if I didn't make the statements.

Q. And, how long was it after that that you made this statement?

A. Well, we had went over what I was to say several times until he was convinced I knew what to say.

Then he locked me back up. Then later, that evening, they had gotten Bobby to make a video-tape, and I come in right behind him and made one.

Q. Is what you said on that video-tape true?

A. None of it is true."

(T.325-27.)

The arresting officers testified that they had used unmarked cars (T.333,350); that they had not seen petitioner put his hand to his mouth at the time of the arrest (T.353) and that there was nothing unusual about him except that he stuttered. (T.343.) Officer Knight testified that petitioner was arrested only because he was with Williams. (T.342.) He denied that the interrogation described by petitioner had occurred, saying that he never took petitioner into a conference room, pulled a gun on him or rehearsed his statement and that guns were not allowed in that area of the station. (T.339.) Officer Guinn testified that he had shown petitioner a videotaped statement in which Williams implicated him; that petitioner called Williams a profane name, said that he would have to tell the truth and subsequently gave his statement. (T.361.)

The jury deliberated for fifty five minutes, returned a verdict of guilty of murder and assessed petitioner's penalty at death.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In Points 6 and 7 of his Petition in Error to the Oklahoma Court of Criminal Appeals, petitioner raised, respectively the federal constitutionality of the imposition of the death penalty and the propriety of the exclusion of death scrupled jurors. These issues were argued as Points I and II of the Brief of Appellant below, and specifically determined against petitioner by the Court of Criminal Appeals. Justus v. Oklahoma, supra, 542 P.2d at 550.

On rehearing, petitioner argued that imposition of the penalty of death in his case would, in view of the decision of the Court of Criminal Appeals severing provisions for imposition of an alternate sentence after a hearing on appeal, violate the ex post facto provisions of the Constitution of the United States. That contention was rejected, for the reasons set forth in Williams v. Oklahoma, 542 P.2d 554, 596-7 (Okla. Cr. App. 1975), and the decision upholding petitioners death sentence was reaffirmed, Justus v. Oklahoma, supra, 542 P.2d at 550-551.

## REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

- and -

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to spare the Court repititous argument, petitioner adopts, as to these issues, the reasons set forth at pages 10 - 38 of the Petition for Certiorari in Green v. Oklahoma, filed March 24, 1976. The relevant portions of that petition are attached as Appendix B.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF FIVE VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

During the selection of petitioner's jury, five veniremen were excluded on account of their expressed attitudes toward the death penalty. The Court of Criminal Appeals held that these exclusions were not error for, although "the trial court conducted such examination as though Witherspoon were applicable," Justus v. State, slip op. at 12, "the applicability of Witherspoon is limited to those cases where, upon conviction for the offense charged, the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment," id. at 8. The court held that a state-law "bias" test was the appropriate standard for determining whether veniremen were properly excluded on account of their death penalty scruples in a capital case:

> "The inapplicability of Witherspoon to the present case, however, does not mean that the exclusion for cause of jurors antagonistic to capital punishment is without standard. In such cases, the appropriate basis for challenge may be for implied bias or actual bias to the extent that the personal scruples or opinions of a venireman will not yield to what the Legislature has determined to be the law." 1/

Slip op. at 11. This holding presents an important issue for this

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1/ The court defined this state-law standard as follows:

> "With respect to implied bias, 22 O.S. 1971, § 660, provides, in pertinent part:

Court's consideration, since it represents a fundamental misapplication of Witherspoon v. Illinois, 391 U.S. 510 (1968).

The basic question presented here is the extent to which the State is empowered to sweep from the jury those veniremen with conscientious scruples against the death penalty under capital trial procedures in which the jury does not make a separate determination of sentence after it has ascertained guilt. The court below clearly approved a standard, see note supra, which allows the exclusion of veniremen on account of their feelings concerning the death penalty upon a "broader basis" than the standard which Illinois was held to have violated in Witherspoon, 391 U.S. at 522 n. 21.

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1/ cont'd.

> 'A challenge for implied bias may be taken for all or any of the following cases, and for no other:
> * * *
> 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror.'
>
> Regarding challenge for actual bias, 22 O.S. 1971, § 659, provides in pertinent part:
>
> 'Particular causes of challenge are of two kinds:
> * * *
> 2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias.'"

Slip op. at 11-12.

Witherspoon is fully applicable to a death penalty procedure such as Oklahoma's (as a number of state courts have held, see People v. District Court, Col. Sup. Ct. No. 27078 (March 11, 1976); Hovila v. State, Tex. Ct. Crim. App. No. 49,396 (April 30, 1975); Owens v. State, __Ga.__, 214 S.E.2d 173 (1975); State v. Trivitt, New Mexico Sup. Ct. No. 10,159 (Feb. 17, 1976); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); and see State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974)) for two reasons. First, although the primary focus of the Witherspoon decision was on the jury's pre-Furman role of "determin[ing] whether [a defendant's] . . . sentence should be imprisonment or death," Witherspoon v. Illinois, supra, 391 U.S. at 518 (footnote omitted), the Court also laid down standards for exclusion of jurors whose death-penalty scruples might interfere with their determination of the separate question of guilt or innocence. The Court noted that:

> "statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man guilty when the penalty might be death . . . . Yet, despite such language, courts . . . have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law. See, e.g., . . . Smith v. State, 5 Okla. Cr. 282, 284, 114 P. 350, 251."

Witherspoon v. Illinois, supra, 391 U.S. at 513 n.5 (emphasis in original). The Court ruled that before veniremen could be

excluded on the ground that their death penalty scruples made them bia[illegible] the issue of guilt, it must be "made unmistakably clear . . . (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22 (emphasis omitted).

Second, the distinction of Witherspoon offered by the Court of Criminal Appeals -- that "the jury no longer acts as 'arbiter of the punishment to be imposed' but is limited to a determination of guilt or innocence," 542 P.2d 605 -- proves either too much or too little. If the court is saying that attitudes regarding capital punishment can play no part in a jury's determination of guilt or innocence of a capital crime, then Oklahoma manifestly has no business death-qualifying jurors at all. But if, as the death-qualification practice approved below attests, attitudes concerning the death penalty can affect jurors' votes on guilt or innocence (or on degree) -- and if a State undertakes to exclude jurors for this very reason -- then a jury selected by the systematic exclusion of death-scrupled jurors is something other and less than a jury representative of the whole community in regard to the questions which the jury must decide. The point, of course, is that under Oklahoma's post-Furman procedure the jury acts simultaneously to determine both guilt and punishment. While Witherspoon may allow the exclusion of veniremen who are demonstrably biased, under an appropriate standard, against the imposition of the death penalty, Witherspoon also specifies

in terms the minimally acceptable constitutional standard for exclusion: it must be made "unmistakably clear . . . that . . . [the excluded jurors] would automatically" reject a verdict carrying the death penalty. Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22 (emphasis omitted).

The difference between the state-law "bias" test and the Witherspoon test for exclusion of death-scrupled jurors is that the former creates a presumption of excludability from the uncertainty of a venireman as to his views or from his inability to state unequivocally whether he could return a verdict whose consequence was death:

> "a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. . . . Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a venireman is unresolved as to whether he could then assess the death penalty, or knowing the death penalty to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a venireman."

Slip op. at 14. Witherspoon, however, requires that a venireman's sentiments be made "unmistakably clear" before he may

be excluded for cause; and in Funicello v. New Jersey, 403 U.S.948 (1971), this Court applied Witherspoon to invalidate precisely the same "equivocal and uncertain" ground of exclusion adopted by the Court of Criminal Appeals here. See Forcella and Funicello v. State, 52 N.J.263, 245 A.2d 181 (1968).

It is evident that the five veniremen excluded for cause below did not make it "unmistakably clear" that their opposition to the death penalty would make it impossible for them to make an impartial decision concerning petitioner's guilt. The examination of these veniremen was exceedingly perfunctory. Venireman Oberton, for example, was excluded on the basis of the following exchange:

> "THE COURT: . . . . Mrs. Oberton, what is your situation?
> MRS. OBERTON: Concerning the death penalty.
> THE COURT: All, right. Let me ask the same question that I have asked before.
> Did I understand that you were a Minister?
> MRS. OBERTON: Yes.
> THE COURT: Is there some part of your religious creed or tenants [sic] that you have this religuous [sic] scruples or principles that would be involved in this?
> MRS. OBERTON: Yes.
> THE COURT: You don't feel that you would be able to sit as a Juror in the case where the death penalty is the punishment.
> MRS. OBERTON: No.
> THE COURT: I am going to excuse you then, and we will have two to get this time."

R. 26-27. Venireman Hamilton was excluded on the basis of a similar examination:

> "MR. HARRIS [the district attorney]: The Laws of Oklahoma require that Murder I requires the death penalty.
> If the State proves, beyond a reasonable doubt that the Defendant was guilty as charged, could you vote the death penalty?
> MR. HAMILTON: No.
> MR. HARRIS: We challenge the Juror for Cause.

THE COURT: Mr. Hamilton, you may step down if you would please."

R. 76-77. The conclusion of the Court of Criminal Appeals that these two veniremen were excluded after it was "clearly and unequivocally establish[ed] that they could not assess the death penalty even assuming the guilt of the defendant to have been established beyond a reasonable doubt," slip op. at 13, is simply not supportable on the basis of the voir dire which was conducted.

The Court of Criminal Appeals admitted that the responses of the first three veniremen to be excused on account of their death penalty scruples "were somewhat equivocal." Ibid. Venireman Johnson repeated, "I don't think I could. I don't think I could," R. 18, when asked whether she could find the defendant guilty of first degree murder.[2] Venireman Bowers, who repeatedly declared she was "nervous"and "afraid",

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2/ "MR. HARRIS [the district attorney]: Now, if we prove him guilty, beyond a reasonable doubt, as charged, the law says that you are to assess the death penalty, no other penalty.
Is there any of you, for any reason, who could not follow that law?
Mrs. Johnson?
MRS. JOHNSON: Oh, no.
MR. HARRIS: You don't think you could follow that law?
MRS. JOHNSON: No, I don't.
MR. HARRIS: No matter what the facts are or the Court's instructions might be?
MRS. JOHNSON: I have known someone, and I don't think I could.
MR. HARRIS: You can't do that.
We will challenge the Juror for Cause.
THE COURT: Let me ask you this question, Mrs. Johnson, are your reservations about the death penalty such that regardless of the law and the facts and the circumstances of

R. 22,25, replied "I don't believe I could [return a first degree murder verdict]. It would make me nervous worrying

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2/ cont'd.

> the case you could not inflict a death penalty, if you found beyond a reasonable doubt that the -- the Defendant to be guilty of the charge of Murder in the First Degree?
> MRS. JOHNSON: Do I have to talk about, please, I mean ---
> THE COURT: (Interposing) I would prefer that you not, really.
> How would you answer the question?
> MRS. JOHNSON: I don't think I could. I don't think I could.
> THE COURT: All, right, I am going to excuse you.
> I think you would have enough problems in that area that it wouldn't be fair to anybody."

R. 17-18.

about it," R. 25.[3] Venireman Cox simply admitted that she

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[3] "MRS. BREWER[sic]: I would like to be excused for the same reason [as Venireman Cox] because I am nervous and I am afraid,

. . .

THE COURT: Let me get back to you in a moment if you will.
MRS. BREWER: I have had a heart attack a few years ago, and I am afraid it might make me nervous.
THE COURT: I will be back in a minute. We need to fill the other seat here, and we will come back to you if you don't mind.

. . . .

MR. HARRIS: Mrs. Bowers, I believe your name is?
MRS. BOWERS: Yes.
MR. HARRIS: You say that you don't know whether you could sit or not?
MRS. BOWERS: I sure don't think I can.
MR. HARRIS: I might suggest to you that the Jury may be sequestered here.

That means you will be kept together over night, and so forth. Does that bother you?
MRS. BOWERS: Well, it might. Like I say, I have . . . [dots in transcript]
THE REPORTER: I am sorry, I can't hear you.
MRS. BOWERS: This case would make me nervous, I believe, if I had to stay, you know.
MR. HARRIS: You don't believe that you could sit as a fair and impartial juror and render a verdict of guilty, knowing that it might be the death penalty?
MRS. BOWERS: I don't believe I could.
MR. HARRIS: You are afraid you couldn't?
MRS. BOWERS: Couldn't.
MR. HARRIS: We challenge the Juror for cause.
THE COURT: Mrs. Bowers, let me ask you this question which I have asked previously of the other Jurors.

Are your reservations about the death penalty such, regardless of the law, the facts and the circumstances of the case, you could not inflict the death penalty, if you found beyond a reasonable doubt the defendant was guilty of the crime of Murder in the First Degree?
MRS. BOWERS: I don't believe I could. It would make me nervous worrying about it, thinking about it, I am sure it would.
THE COURT: I am going to excuse you Mrs. Bowers."

R. 22, 24-25.

"just [didn't] . . . know", R. 21, whether she could return a first degree murder verdict because she had "some reservations", ibid.,about the death penalty and would "really like to be excused," R. 22. 4/

---

4/ "MR. HARRIS [the district attorney]: . . . . Now, if we prove those facts, then you have only one --- to your satisfaction, you have only one choice, and that's to find him guilty and assess the death penalty, either that or nothing.

Does that bother any of you?

Mrs. Cox, . . . [dots in transcript]

MRS. COX: Yes, sir, it does.

MR. HARRIS: What is it?

MRS. COX: Yes, sir, it does. I am just not really sure.

I think we should not have the death penalty. I don't know. I am really unsure about that.

It is just . . . [dots in transcript]

MR. HARRIS: You listen -- could you listen to the evidence?

MRS. COX: Yes, sir, I could listen to the evidence.

MR. HARRIS: And instructions of the Court?

MRS. COX: Yes, sir.

MR. HARRIS: And follow the law with reference to it.

MRS. COX: Yes, sir.

MR. HARRIS: And, if the State proves, beyond a reasonable doubt he was guilty?

MRS. COX: Yes, sir.

MR. HARRIS: Could you assess the death penalty?

MRS. COX: I just don't know. I -- I am afraid it would bother me later on. I just don't know, really. I mean . . . [dots in transcript]

MR. HARRIS: You have some reservations about that, don't you?

MRS. COX: Yes, sir.

MR. HARRIS: We ask the Juror be excused for cause.

THE COURT: Just a minute. I need to ask you a question, Mrs. Cox.

Are your reservations about the death penalty such that regardless of the law, the facts, and the circumstances of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the Defendant was guilty of the crime of Murder in the First Degree?

The right of a capital defendant to a fair and impartial trial in which the "scales . . . are not deliberately tipped toward death," Witherspoon v. Illinois, supra, 391 U.S. at 522 n.20, was held to be fundamental:

> "the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today."

Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22. The Court should grant certiorari in this case to determine whether Oklahoma has not impermissibly diluted a capital defendant's right to a jury selected in accordance with Witherspoon's requirements.

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4/ cont'd.

> MRS. COX: That is why I would really like to be excused.
> I think --- I feel like I have to do it if I felt like, you know, it was proved to me, and I just --- I'm just --- I just don't know.
> THE COURT: All, right, I am going to excuse you."

R. 20-22.

## CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

SEP 17 1975
Ross N. Ellis, J.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALLEN CLAYBURN JUSTUS, )
)
Appellant, )
)
vs. )
)
THE STATE OF OKLAHOMA, )
)
Appellee. )

FOR PUBLICATION

No. F-74-713

AUTHORIZED FOR FILING
SEP 17 1975
COURT OF CRIMINAL APPEALS

- SYLLABUS -

1. The State, as well as the defendant, is entitled to a fair and impartial jury, and a juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror.

2. Where upon conviction for the offense charged the assessment of the death penalty is mandatory, the appropriate basis for a challenge for cause against veniremen antagonistic to capital punishment may be for implied bias or actual bias to the extent that the personal scruples or opinions of prospective jurors will not yield to the law as enacted by the Legislature, and the pertinent voir dire inquiry is whether, in view thereof, the veniremen can dliberate upon the evidence impartially under the law and assess such punishment should guilt be established beyond a reasonable doubt.

3. No venireman with animosity concerning the death penalty should be excused upon that basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if knowing the death penalty to be mandatory upon conviction, a venireman is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, or if satisfied of the defendant's guilt beyond a reasonable doubt, he is unresolved as to whether he could then assess the death penalty, then a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. A challenge for cause should be granted against such a venireman, for otherwise the administration of the oath would be frivolous and create chaos resulting in our system of jurisprudence being a mockery based upon the personal whims of individuals.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA, HONORABLE WILLIAM C. KESSLER, JUDGE.

ALLEN CLAYBURN JUSTUS was convicted for the offense of Murder in the First Degree; was sentenced to Death, and appeals. Judgment and Sentence AFFIRMED.



BEST COPY AVAILABLE

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OKLAHOMA COUNTY,
Attorney for Appellant,

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Attorneys for Appellee.

OPINION BY BUSSEY, J.,
TOM BRETT, P.J. and
BLISS, J., Concur.



BEST COPY AVAILABLE

BUSSEY, JUDGE:

Appellant, Allen Clayburn Justus, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Oklahoma County, Case No. CRF-73-3180, for the offense of Murder in the First Degree, in violation of 21 O.S.Supp.1974, § 701.1, ¶ 2. In accordance with the provisions of 21 O.S.Supp.1974, § 701.3, the defendant was thereafter sentenced to suffer death, and from said judgment and sentence a timely appeal has been perfected to this Court.

At the trial, Phillip Eugene Keen, M.D., a medical examiner for the State, testified that he examined the body of Robert Holmes on October 9, 1973, and determined the cause of death to have been a gunshot wound to the head which entered the right temple, transacted the brain stem and exited behind the left ear. He further expressed the opinion that death had likely occurred at least five hours prior to his examination at 1:40 p.m.

Ted Yokum, a night dispatcher for the Yellow Cab Company, next testified that Robert Holmes was a driver for that company on October 9, 1973, and that the witness last had contact with him at about 3:00 o'clock that morning when he first dispatched him to a grocery store at 16th and Drexel and then to the South Point Apartments in the 900 block of S.W. 60th.

Carol Lavon Edwards then testified that at about 3:00 a.m. on October 9, 1973, she telephoned for a Yellow Cab

to take her from a grocery store at 16th and Drexel to S.W. 47th and Pennsylvania. While en route in cab no. 50, she overheard the dispatcher direct the driver to the South Point Apartments.

Officer Marvin Doherty, assigned to the crime lab division of the Oklahoma City Police Department, next testified that at about 11:00 a.m. on October 9, 1973, he was dispatched to the South Point Apartments where he processed a Yellow Cab no. 50 for latent fingerprints and photographed the scene. Although numerous latent fingerprints were found both inside and outside the cab, none could be identified as those of the defendant. He identified State's Exhibits Nos. 3 through 6 as photographs of that scene and all but Exhibit No. 4 were then admitted into evidence. State's Exhibit No. 2 was identified as a projectile found in the right-rear floorboard of the cab, and he observed that the windshield appeared to have been cracked, but not penetrated, by a sharp object near the left side.

Phyllis Hemphill, manager of the South Point Apartments, then testified that at about 7:00 a.m. on October 9, 1973, she noticed a Yellow Cab no. 50 parked in the apartment parking lot. At about 10:30 a.m., she approached the cab to place a note on the windshield because the vehicle was occupying two spaces, but noticing blood running from the door, she telephoned the police.

Ray Lambert, firearms examiner for the Oklahoma State Bureau of Investigation, next testified that he had examined

State's Exhibit No. 2, and determined it to have been a .38 caliber bullet. That exhibit was then admitted into evidence.

Detective Jerry Guinn, assigned to the homicide and robbery division of the Oklahoma City Police Department, then testified that he participated in the arrest of the defendant on November 2, 1973, and identified State's Exhibit No. 7, as a Waiver of Rights form, executed by the defendant shortly before he agreed to give a video-tape statement regarding the alleged offense the following night. That exhibit was then admitted into evidence. This witness also testified that the location described by the defendant in his video-tape statement, as the place of the homicide, was within Oklahoma County, Oklahoma.

Officer Bob J. Coffia, assigned to the special services division of the Oklahoma City Police Department, next testified that he was trained in the use of video-tape equipment and that he recorded the video-tape statement of the defendant, State Exhibit No. 8, in the police station at about 9:00 p.m. on November 3, 1973.

This video-tape was then exhibited visually and audibly to the jury, after which the State rested its case in chief. Following an evidentiary hearing, outside the presence of the jury, the court previously had ordered the deletion of certain incompetent matter from this video-tape, but had overruled a Motion to Suppress wherein the defendant asserted that he had not knowingly, voluntarily and intelligently made the same with the benefit of his Miranda rights.

In this video-tape statement, the defendant first acknowledged that he had read and understood his rights, and with

reference to the subject offense was then interviewed in part, as follows:

> "OFFICER GUINN: Would you tell me in your own words the knowledge that you have pertaining to this homicide?
>
> "MR. JUSTUS: I will. I am not sure of the date. But, this certain night, I called up the Yellow Cab Company.
>
> I requested a cab to come to the South Point Apartments.
>
> I then ran down to the South Point Apartments and waited at Apartment 3, downstairs.
>
> Uh, the cab pulled up. I got in the car. We left and I directed him to 74th Street. That is an apartment complex out there.
>
> Traffic was too busy so I couldn't do what I wanted to do at that time, so I directed him over to Western. I am not sure of the street, but right off Western.
>
> I had him stop. When he stopped, I cocked my pistol and shot him.
>
> Then I moved him over and drove to the South Point Apartments, took his money, wiped the car down and walked home." [Tr. 279 & 280]

Elsewhere in this statement, the defendant disclosed that the money taken amounted to approximately $30.00 plus some change, and that he perpetrated the crime alone. He also related that he had worn gloves, and that the gun used was a .38 caliber chrome-plated Colt Revolver which he later had Bobby Williams throw in the trash. He immediately burned the victim's wallet and personal papers at home in the presence of his wife, and washed the blood from his clothes in cold water. He did, however, notice from the personal papers that the name of the victim was Ralph or Robert Holmes.

Bobby Joe Williams testified as the first defense witness that he was a friend of the defendant and they were both arrested together on November 2nd, and that the defendant's wife was also arrested the same night. The following day he gave a statement to the police implicating the defendant because he was told that he would be released if he would do so. However, he further testified that the defendant had never admitted to him any involvement in the death of the victim, and that he had never seen the defendant with a gun, nor thrown one away for

the defendant. Shortly following their arrest, he testified that he overheard Detective Knight say that he would like to see the defendant get his head blown off and that he would not mind doing so, and the following day he heard that officer tell the defendant that if he did not make a statement to clear up this murder case he would never get out of jail. During cross-examination the witness admitted a conviction for Murder before the same court one month earlier, which was on appeal. Although he would not acknowledge the statement, he was also impeached with his previous unsworn statement wherein the defendant purportedly admitted the crime to the witness.

Jimmy L. Justus next testified that he was the defendant's father and that at about midnight on the day of the defendant's arrest he received a telephone call from Detective Knight requesting that he come to the police station and encourage his son to give a statement. He there observed the defendant's eyes to be glassy, and the defendant kept rolling them as if he could not focus. The defendant, at that time, denied any knowledge of the matters upon which he had been questioned and asked his father to get him a lawyer.

The defendant was the final witness in his behalf and testified that while under the influence of LSD he was threatened and coerced into making the video-tape confession after being coached and rehearsed, and that the contents thereof were not true. The defendant explained that shortly before being arrested he had purchased some LSD at which time he took one tablet, but then took the remaining quantity just prior to his arrest to keep from being caught with them. He was first told that he was being arrested for back tickets, but before arriving at the police station he was told he had been arrested for Murder

because he was with Bobby Williams. Despite his repeated request for an attorney, he was thereafter questioned several times and told he would not need an attorney until transferred to the county jail, however, he was not questioned about this case until after Bobby Williams had made his statement which the defendant observed on video-tape. While still under the influence of LSD, he agreed to give his video-tape confession after Detective Knight threatened him and repeatedly prepared him as to what to say. He asserted that Detective Knight displayed a cocked revolver and threatened to shoot and kill him for escape. Also, Detective Knight purportedly threatened to have the defendant's wife charged with Murder and held without bond, and said that the defendant would never again see his son who had been placed in a children's shelter. The defendant admitted a conviction, which was on appeal, for First Degree Murder, one month earlier before the same court along with Bobby Williams, and also felony convictions for Second Degree Forgery and Attempted Larceny of a Motor Vehicle.

Detective Adam J. Knight, assigned to the homicide division of the Oklahoma City Police Department, then testified that he also participated in the arrest of the defendant and Bobby Williams on the afternoon of November 2, 1973, and introduced testimony tending to show that the defendant did not inject LSD into his mouth upon being arrested, nor demonstrate the purported symptoms of being under the influence of the same. He explained that he questioned the defendant on only two occasions, first shortly after arrival at the police station and then early the following afternoon, and that the subject offense was not discussed during these interviews. He advised the defendant of his constitutional rights prior to the

first interview, including his right to an attorney, but at no time did the defendant request an attorney. He denied the allegations of misconduct attributed to him by the defendant and Bobby Williams, and specifically denied ever threatening the defendant or rehearsing him to make the video-tape confession. Just before the defendant made the video-tape confession, this witness testified that he was present when Detective Guinn interviewed the defendant, and that after observing a video-tape statement made by Bobby Williams, the defendant "started saying how stupid Williams was, calling him a few names, and he then said, well, I am going to have to tell them the whole truth now about everything." [Tr. 340]

Detective Jerry Guinn was then recalled and testified that he only interviewed the defendant at the time of the video-tape confession, and that shortly prior thereto he questioned Bobby Williams who stated that the defendant had admitted particulars of the crime to him. When the defendant was then shown a video-tape of the statement made by Bobby Williams, "he looked at Mr. Williams and he called him a profane name, and he told him, said don't you see what they are doing. Now, I am going to have to tell the truth, and I am going to have to give a statement and clear up the crime." [Tr. 361]. This witness also corroborated the testimony of Detective Knight which tended to establish that the defendant did not inject LSD into his mouth as the arresting officers approached.

The State then rested rebuttal and no evidence in surrebuttal was offered in behalf of the defendant.

In his first assignment of error, the defendant contends that the death sentence is unconstitutional by virtue of the

decision of the United States Supreme Court in the consolidated cases of Furman v. Georgia, Jackson V. Georgia and Branch v. Texas, 408 U.S. 233, 92 S.Ct. 2726, 32 L.Ed.2d 346 (1972). However, in this regard we need only observe that this contention was thoroughly analyzed and rejected by this Court in the consolidated opinion of Williams and Justus v. State, Okl.Cr., ____P.2d ____, F-74-648 and F-74-650 (1975).

In his final assignment of error the defendant contends that the death penalty cannot be imposed because five veniremen were improperly excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The pertinent voir dire examination of these prospective jurors is set forth in the Appendix hereto. In that decision expressing the views of five Justices, the United States Supreme Court held as follows:

> ". . . Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. . . ." (391 U.S. 522, footnote omitted).

However, we agree with the position ably adopted by the State on appeal that the applicability of Witherspoon is limited to those cases where, upon conviction for the offense charged, the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment. This conclusion becomes clearly apparent upon an examination of the facts and rationale upon which that decision was based. In pertinent part, the United States Supreme Court there reasoned as follows:

> ". . . We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. . . .

"It does not follow, however, that the petitioner is entitled to no relief. For in this case the jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death. It has not been shown that this jury was biased with respect to the petitioner's guilt. But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments. . . .

". . . [I]n Illinois, as in other States, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.

"A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death. . . .

"If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. . . . [391 U.S. 517-521, footnotes omitted]

* * *

"It is suggested in a dissenting opinion today that the State of Illinois might 'impose a particular penalty, including death, on all persons convicted of certain crimes.' . . . But Illinois has attempted no such thing. Nor has it defined a category of capital cases in which 'death [is] the preferred penalty.' . . . Instead, it has deliberately 'made . . . the death penalty . . . an optional form of punishment which [the jury remains] free to select or reject as it [sees] fit.' . . . And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system . . ." [Footnote 15, 391 U.S. 519]

In a separate opinion to Witherspoon, Justice Douglas singularly adopted an extreme position which emphasized jury selection from a cross-section of the community. In such cases, he was of the opinion that the State should be prohibited from excusing for cause even jurors irreconcilably opposed to the death penalty, and that not only the death sentence, but the

verdict of guilt as well should be reversed since prejudice should be presumed from the resulting class exclusion. However, even in expressing this view, Justice Douglas recognized the inapplicability of Witherspoon to cases wherein the jury does not retain discretion in the imposition of the death penalty, in stating:

> "The Court in Logan v United States, 144 US 263, 298, 36 L Ed 429, 441, 12 S Ct 617, held that prospective jurors who had conscientious scruples concerning infliction of the death penalty were rightly challenged by the prosecution for cause, stating that such jurors would be prevented 'from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence. . . .' . . .
>
> "But where a State leaves the fixing of the penalty to the jury, or provides for a lesser penalty on recommendation of mercy by the jury, or gives the jury power to find guilt in a lesser degree, the law leaves the jury great leeway. Those with scruples against capital punishment can try the case 'according to the law and the evidence,' because the law does not contain the inexorable command of 'an eye for an eye.' Rather 'the law' leaves the degree of punishment to the jury. Logan v United States in the setting of the present case does not state what I believe is the proper rule. Whether in other circumstances it states a defensible rule is a question we need not reach. Where the jury has the discretion to impose the death penalty or not to impose it, the Logan rule is, in my opinion, an improper one. For it results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy." [391 U.S. 528-529, footnotes omitted]

The capital punishment provisions under which the defendant here was convicted, 21 O.S.Supp.1974, § 701.1 et seq. were enacted by the Oklahoma Legislature in response to Furman, supra, and making the assessment of the death penalty mandatory upon conviction for First Degree Murder, represent the extreme approach necessary to curb the unfettered sentencing discretion condemned in that case. See Williams, supra. In this regard, § 701.3 provides, in pertinent part:

> "Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall sufer death. . . ."

With respect to the imposition of the death penalty, the "conscience of the community" is thus embodied in the above provision enacted by the duly elected representatives of the people, and in such cases the jury no longer acts as "arbiter of the punishment to be imposed" but is limited to a determination of guilt or innocence, with assessment of the death penalty being mandatory upon conviction. Justice Douglas would apparently extend Witherspoon to cases wherein an instruction upon a lesser included offense was appropriate even though the death penalty was mandatory upon conviction for the principal offense charged. However, no such instruction was given or called for here, and we observe that the view of the majority in that case was concerned with situations wherein the jury was "[g]uided by neither rule nor standard" and within its discretion free to choose between the death penalty or lesser punishment for the offense charged.

The inapplicability of Witherspoon to the present case, however, does not mean that the exclusion for cause of jurors antagonistic to capital punishment is without standard. In such cases, the appropriate basis for challenge may be for implied bias or actual bias to the extent that the personal scruples or opinions of a venireman will not yield to what the Legislature has determined to be the law.

With respect to implied bias, 22 O.S.1971, § 660, provides, in pertinent part:

> "A challenge for implied bias may be taken for all or any of the following cases, and for no other:
>
> * * *
>
> 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror."

Regarding challenges for actual bias, 22 O.S.1971, § 659, provides in pertinent part:

> "Particular causes of challenge are of two kinds:
> * * *
> 2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias."

In Application of Sharp, Okl.Cr., 414 P.2d 720, 722 (1966), this Court stated with regard to challenges for implied bias:

> ". . .[W]e have repeatedly held that 22 O.S.1961, § 660 requires a juror's removal for cause if he has conscientious opinions concerning capital punishment that would preclude his finding the defendant guilty. See Cardwell v. State, 20 Okl.Cr. 177, 201 P. 817 and Reed v. State, 2 Okl.Cr. 539, 103 P. 1012."

We have carefully reviewed the voir dire examination in this case, and first observe that the trial court conducted such examination as though Witherspoon were applicable, whereas to the extent of the inquiry made, the prosecutor utilized a more appropriate approach, i.e. inquiry for a determination as to whether the veniremen could assess the death penalty were the State to prove the defendant guilty of the offense charged beyond a reasonable doubt. The prosecutor could, however, have appropriately inquired further as to whether the mandatory assessment of such punishment upon conviction would prevent the veniremen from standing indifferent between the State and the defendant in the deliberation of their verdict according to the law and the evidence. The people have, through the Legislature, predetermined that such offenses are proper cases for the exclusive assessment of capital punishment, and the pertinent voir dire inquiry is whether in view thereof, the veniremen can deliberate upon the evidence impartially under the law and assess such punishment should guilt be established beyond a reasonable doubt.

We find that the voir dire examination of the last two veniremen excused upon this basis, Mrs. Oberton and Mr. Hamilton, clearly and unequivocally establish that they could not assess the death penalty even assuming the guilt of the defendant to have been established beyond a reasonable doubt. Although the examination of Mrs. Oberton was relatively limited, she was one of the original twelve veniremen to be called, and this conclusion becomes apparent in view of the reference by the trial court to the questions previously propounded. Viewed most favorably to the defendant, the responses of the first three veniremen to be so excused were somewhat equivocal. However, we observe that defense counsel did not object to the exclusion of any of the five subject veniremen, and this would certainly indicate that he did not then consider the defendant to have been prejudiced. Further, the absence of a systematic scheme to exclude all veniremen with hesitation concerning the death penalty and irrespective of their capacity to otherwise sit as fair and impartial jurors, is evidenced by the following examination conducted by the prosecutor of Mrs. Horn, who was one of the jurors finally empanelled to try this case:

> "MR. HARRIS: Mrs. Horne, you have heard all of the questions asked here, and, could you render a verdict, knowing that it would be a death penalty?
>
> MRS. HORNE: I hate to say this, but I don't know whether I could do it or not. I really don't.
>
> MR. HARRIS: Could you except [sic] the . . .
>
> MRS. HORNE: . . . the evidence?
>
> MR. HARRIS: The instructions of the Court?
>
> MRS. HORNE: Yes.
>
> MR. HARRIS: And the evidence from the witness stand and decide this case on those things, and those alone?

"MRS. HORNE: Uh, huh.

MR. HARRIS: And, if it proved him guilty, beyond a reasonable doubt, as charged, and that meant the death penalty, could you render a verdict for that?

MRS. HORNE: Well, I would do my best.

MR. HARRIS: You would try, wouldn't you?

MRS. HORNE: I would try." [Tr. 29-30]

We are of the opinion that a challenge for cause is appropriate to the extent that the veniremen is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. Under even the requirements of Witherspoon, this Court has previously approved challenges for cause where otherwise appropriate and based upon responses of a no more equivocal nature than existed here. See Koonce v. State, Okl.Cr., 456 P.2d 549 (1969), death sentence modified to life imprisonment pursuant to Furman, supra, 408 U.S. 934, 92 S.Ct. 2845, 33 L.Ed.2d 748 (1972), 502 P.2d 1043 (1972), and Gibson v. State, Okl.Cr., 501 P.2d 891 (1972). Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a veniremen is unresolved as to whether he could then assess the death penalty, or knowing the death peanlty to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a veaireman, for otherwise the administration of the oath would be frivolous. We agree with the cogent argument of the State that the trial court should not accept a juror who does not know

whether he can follow the law, and that to do otherwise would create chaos and make our system of jurisprudence a mockery based upon the person whims of individuals. The State, as well as the defendant, is entitled to a fair and impartial jury. See Payne v. State, Okl.Cr., 276 P.2d 784 (1954) and Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 S.Ct. 350 (1887). In holding this proposition to be without merit, we adopt the following language from Logan, supra, also approved by three Justices in a dissenting opinion to Witherspoon:

> ". . . A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror . . ." [144 U.S. 299]

The evidentiary hearing contemplated under the provisions of 21 O.S.Supp.1974, §§ 701.5 and 701.6 was previously assigned and heard by this Court. No evidence was offered by either the defendant or the State upon that hearing. Rather, shortly prior thereto the defendant filed a motion requesting that this Court establish guidelines for the review of death sentences under those statutory provisions, and each party hereto candidly indicated that without such guidelines these statutes were so vague and uncertain that they were unaware as to how to proceed. As we have by our decision in Williams and Justus v. State, supra, held these provisions to be unconstitutional, no further discussion thereof is necessary here.

Pursuant to Rule 1.11 of this Court, 22 O.S.Supp.1974, Chp. 18, App., this case was previously assigned and heard for oral argument. We have now carefully reviewed the entire record before this Court, and thoroughly considered the argument and authority presented, and have determined that the

record is free of any error of law requiring reversal. The judgment and sentence is accordingly AFFIRMED.

Pursuant to Rule 1.18, 22 O.S.Supp.1974, Chp. 18, App., the defendant is advised that any Petition for Rehearing herein must be filed with the Clerk of this Court within fifteen (15) days of the date upon which this opinion is filed therein.

## APPENDIX

### Selected Voir Dire Examination

"MR. HARRIS: Now, if we prove him guilty, beyond a reasonable doubt, as charged, the law says that you are to assess the death penalty, no other penalty.

Is there any of you, for any reason, who could not follow that law?

Mrs. Johnson?

MRS. JOHNSON: Uh, no.

MR. HARRIS: You don't think you could follow that law?

MRS. JOHNSON: No, I don't.

MR. HARRIS: No matter what the facts are or the Court's instructions might be?

MRS. JOHNSON: I have known someone, and I don't think I could.

MR. HARRIS: You can't do that.

We will challenge the Juror for Cause.

THE COURT: Let me ask you this question, Mrs. Johnson, are your reservations about the death penalty such that regardless of the law and the facts and the circumstances of the case you could not inflict a death penalty, if you found beyond a reasonable doubt that the---the Defendant to be guilty of the charge of Murder in the First Degree?

MRS. JOHNSON: Do I have to talk about, please. I mean ---

THE COURT: (Interposing) I would prefer that you not, really.

How would you answer the question?

MRS. JOHNSON: I don't think I could. I don't think I could.

THE COURT: All, right, I am going to excuse you.

I think you would have enough problems in that area that it wouldn't be fair to anybody." [Tr. 17 & 18]

* * *

"MR. HARRIS: Now general --- a few more general questions to all of you.

You will require that the Defendant --- that we, the State, prove the Defendant guilty beyond a reasonable dout [sic] as charged, and he is charged with committing murder while engaged in an armed robbery.

Now, if we prove those facts, then you have only one --- to your satisfaction, you have only one choice, and that's to find him guilty and assess the death penalty, either that or nothing.

Does that bother any of you?

Mrs. Cox, . . .

MRS. COX: Yes, sir, it does.

MR. HARRIS: What is it?

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"MRS. COX: Yes, sir, it does. I am just not really sure.
I think we should not have the death penalty. I don't know. I am really unsure about that.
It is just . . .

MR. HARRIS: You listen --- could you listen to the evidence?

MRS. COX: Yes, sir, I could listen to the evidence.

MR. HARRIS: And instructions of the Court?

MRS. COX: Yes, sir.

MR. HARRIS: And follow the law with reference to it.

MRS. COX: Yes, sir.

MR. HARRIS: And, if the State proves, beyond a reasonable doubt he was guilty?

MRS. COX: Yes, sir.

MR. HARRIS: Could you assess the death penalty?

MRS. COX: I just don't know. I --- I am afraid it would bother me later on. I just don't know, really. I mean, . . .

MR. HARRIS: You have some reservations about that, don't you?

MRS. COX: Yes, sir.

MR. HARRIS: We ask the Juror be excused for cause.

THE COURT: Just a minute. I need to ask you a question, Mrs. Cox.
Are your reservations about the death penalty such that regardless of the law, the facts, and the circumstances of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the Defendant was guilty of the crime of Murder in the First Degree?

MRS. COX: That is why I would really like to be excused.
I think --- I feel like I have to do it if I felt like, you know, it was proved to me, and I just --- I'm just --- I just don't know.

THE COURT: All, right, I am going to excuse you.

(WHEREUPON, Mrs. Juanita R. Cox was excused.)

MRS. BREWER [sic. MRS. POWERS]: I would like to be excused for the same reason, because I am nervous and I am afraid, . . .

THE COURT: Let me get back to you in a moment if you will.

MRS. BREWER [sic MRS. POWERS]: I have had a heart attack a few years ago, and I am afraid it might make me nervous.

THE COURT: I will be back in a minute. We need to fill the other seat here, and we will come back to you if you don't mind." [Tr. 20-22]

* * *

"MR. HARRIS: Mrs. Bowers, I believe your name is?

MRS. BOWERS: Yes.

MR. HARRIS: You say that you don't know whether you could sit or not?

MRS. BOWERS: I sure don't think I can.

MR. HARRIS: I might suggest to you that the Jury may be sequestered here. That means you will be kept together over night, and so forth. Does that bother you?

MRS. BOWERS: Well, it might. Like I say, I have . . .

THE REPORTER: I am sorry, I can't hear you.

MRS. BOWERS: This case would make me nervous, I believe, if I had to stay, you know.

MR. HARRIS: You don't believe that you could sit as a fair and impartial juror and render a verdict of guilty, knowing that it might be the death penalty?

MRS. BOWERS: I don't believe I could.

MR. HARRIS: You are afraid you couldn't?

MRS. BOWERS: Couldn't.

MR. HARRIS: We challenge the Juror for cause.

THE COURT: Mrs. Bowers, let me ask you this question which I have asked previously of the other Jurors.

Are your reservations about the death penalty such, regardless of the law, the facts and the circumstances of the case, you could not inflict the death penalty, if you found beyond a reasonable doubt the defendant was guilty of the crime of Murder in the First Degree?

MRS. BOWERS: I don't believe I could. It would make me nervous worrying about it, thinking about it, I am sure it would.

THE COURT: I am going to excuse you Mrs. Bowers." [Tr. 24 & 25]

* * *

"THE COURT: . . . Now, there is nothing particularly easy about being a Juror, as you may have discovered by now, and I don't anticipate that this case will be either.

Mrs. Oberton, what is your situation?

MRS. OBERTON: Concerning the death penalty.

THE COURT: All, right. Let me ask the same question that I have asked before.

Did I understand that you were a Minister?

"MRS. OBERTON: Yes.

THE COURT: Is there some part of your religious creed or tenants that you have this religious scruples or principles that would be involved in this?

MRS. OBERTON: Yes.

THE COURT: You don't feel that you would be able to sit as a Juror in the case where the death penalty is the punishment.

MRS. OBERTON: No.

THE COURT: I am going to excuse you then . . ." [Tr. 26 & 27]

* * *

"MR. HARRIS: The Laws of Oklahoma require that Murder I requires the death penalty.

If the State proves, beyond a reasonable doubt that the Defendant was guilty as charged, could you vote the death penalty?

MR. HAMILTON: No.

MR. HARRIS: We challenge the Juror for Cause.

THE COURT: Mr. Hamilton, you may step down if you would, please." [Tr. 76 & 77]

APPENDIX B

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); Menthen v. Oklahoma, 408 U.S. 940 (1972).[3]

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder.[4] 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

> "1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;
>
> "3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

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3/ See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

4/ Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."[5] In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."[6] The statute authorizes capital juries to be instructed "regarding

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5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."[7] Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"[8] §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining inter alia "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."[9]

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7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.). Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.PA.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to " . . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Dickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, ____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. ____, 197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, ____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, ____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 4, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

> "We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S.Supp.1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated[10/] -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okla. Cr. App. 1975), the court further declared that:

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10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okla. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okla. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okla. Cr. App. 1975); Lusty v. State, 452 P.2d (Okla. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okla. Cr. App. 1975); Jones v. State, 452 P.2d 1316 (Okla. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 528 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24 , 29 - 36 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmance of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

> "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence. 11/ The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

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11/ Under the old law governing grand larceny, the sentencing court was required to fix a minimum term of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

> "It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." 12/

301 U.S. at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . '[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

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12/ "Removal of the possibility of a sentence of less than fifteen years . . . operates to . . . [petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 352 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583. and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).[13/] The Court should grant certiorari to determine

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13/ "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

## III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

### A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information.[14/] In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 p. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Bent v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 210 (1938).[15/]

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

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14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court, 473 P.2d 312 (Okla. Cr. App. 1970).[16]

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

> "it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Sowards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Winfield v. State, 44. Okla. Cr. 232, 280 P.630, 632 (1929) ("'[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain . . . .'"), with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

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16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprosecution for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree [17/] as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

> "In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

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17/ The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague[18/] and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter his original choice.[19/]

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation[20/] and is "used quite extensively in Oklahoma,"[21/] is also predominantly a matter of prosecutorial discretion. Although court approval is required

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18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28 , 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,[22] the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra, 536 P.2d 965, 971[23] (1975).[24] The Young opinion leaves unclear whether the State is required to convice the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

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22/ State ex rel. Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App. No. O-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court. No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

> Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.
>
> William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.
>
> Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRF-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Harvell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF 74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime,[25] "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses"[26] and the philosophy and attitudes of the local prosecutor.[27] [28]

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25/ Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1969).

26/ Id. at 84.

27/ Id. at 83:

> "One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

28/ In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

> "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." 29/

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, 30/ under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4, 11-12 supra), which forbids the submission of evidentially unsupported lessers. Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

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29/ Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

> "Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

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> "[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and Young cases previously discussed [31] -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Furman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

> "From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

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31/ See pp. 23-28 supra.

defendants for first degree murder,[32/] but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp.2-3 supra, neither robbery-murder nor murder in any of the ten enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

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32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946);[33] that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899);[34] that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Ging v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

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33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirey v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

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mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no jury hearing it for the first time can fairly be expected to understand it," ibid.; 35/ and it therefore represents

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35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1)(1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

> "Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

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35/ cont'd.

> "Premeditation[.] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

> "'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943)(quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "'[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life.'" Walker v. State, 91 Okla. Cr. 1, 214 P2d. 961, 963 (1950). This mental purpose is "'"formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act."'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974)(defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

"refractory to the best-instructed human understanding"[36] that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt."[37]

> "[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless."[38]

And if "'[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose,'" Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

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36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired conclusion"[39] where the stakes are life or death[40] and where the enormity of those stakes is forcibly brought home to the jurors by the requirement that they "state affirmatively in their [first degree murder] verdict that the defendant shall suffer death."[41]

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39/ BLACK, op. cit. supra note 38, at 46.

40/ The resort by juries even to verdicts of acquittal as a means of avoiding capital convictions" in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty" is an historical commonplace. McGautha v. California, 402 U.S. 183, 199 (1971). See the authorities collected in the Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, at pp. 90-92 n.122.

41/ Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p. supra. The Court of Criminal Appeals has indicated that the omission of such a statement would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-79, but the requirement serves nonetheless to assure that the jury is aware of the life-or-death consequences of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "[A]n abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon . . . . " Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

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Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present Petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

> "[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."42/

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Gregg, Roberts, Woodson-Waxton and Jurek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Jurek (No.75-5394).

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42/ White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.